

JENNIFER STISA GRANICK (CA Bar No. 168423)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Seventh Floor
San Francisco, CA 94104
Telephone: 415-343-0758
jgranick@aclu.org

JACOB A. SNOW (CA Bar No. 270988)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: 415-621-2493
Fax: 415-255-1478
jsnow@aclunc.org

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE and FEDERAL
BUREAU OF INVESTIGATION,

Defendants.

Case No. 3:20-cv-09284-CRB

**STATUS REPORT AND FURTHER JOINT
CASE MANAGEMENT STATEMENT**

Pursuant to Court order (ECF No. 38), the parties jointly submit this Status Report and Further Case Management Statement pursuant to Civil Local Rule 16-9 and the Standing Order for All Judges of the Northern District of California—Contents of Joint Case Management Statement.

Status Report

As reported in the last case management statement (ECF No. 37), the parties have continued working together to narrow the issues in dispute. The parties now report as follows:

The parties agreed to narrow the Request to encompass only the following two categories of records responsive to the Request:

- technical manuals or guides, standard operating procedures, and/or documents concerning best practices; and
- training and/or briefing materials.

For the avoidance of doubt, the agreed-upon narrowed scope of potentially responsive records excludes records that pertain to FBI investigations and/or joint law enforcement actions (*i.e.*, investigatory files).

The parties further agreed that the primary dispute between the parties is whether the narrowed categories of potentially responsive records are subject to FOIA Exemption 7(E) in full. Exemption 7(E) protects law enforcement information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The parties agree that resolution of whether Exemption 7(E) protects the responsive records in full could be dispositive of the entire lawsuit.

Third, to facilitate resolution of that primary, and potentially dispositive, Exemption 7(E) dispute, the parties agreed to bifurcate these proceedings, such that FBI initially reviewed the potentially responsive records for application of Exemption 7(E) only. The FBI has completed that review and released non-exempt documents. The FBI is withholding the remaining responsive documents on the basis of Exemption 7(E).

At this point, the parties may submit the Exemption 7(E) dispute to the Court for adjudication via summary judgment briefing. If the Court finds that Exemption 7(E) protects the narrowed responsive records, that determination would be dispositive. However, if the Court finds that Exemption 7(E) does not protect the narrowed responsive records in full, then the parties agree that FBI may review the potentially responsive records for any and all underlying FOIA exemptions, which would then be adjudicated via a second summary judgment motion. By bifurcating the proceedings in this manner, the

1 parties agree that FBI expressly reserves and does not waive any and all underlying FOIA exemptions that
2 might apply to the potentially responsive records notwithstanding the fact that FBI does not assert them
3 in the initial summary judgment proceedings. The parties recognize that the requested bifurcated
4 proceedings might result in two summary judgment proceedings. In the last Case Management Statement
5 filed on September 16, 2022 (ECF No. 25), the parties respectfully requested leave from this Court to
6 proceed in this manner in the interest of judicial economy and conservation of government resources. *See*
7 Standing Order for Civil and Criminal Cases Before Judge Charles R. Breyer § I.C (“Each party is limited
8 to filing one summary judgment motion. Any party wishing to exceed this limit must request leave of the
9 Court and must show good cause”). FBI submits that identifying and justifying any and all underlying
10 FOIA exemptions and litigating all of those underlying exemptions in one summary judgment motion
11 would be unduly taxing on FBI’s and the Court’s limited resources and would result in significant delays
12 to the resolution of this lawsuit, especially where resolution of the primary Exemption 7(E) dispute could
13 be dispositive.

14 The FBI has completed the bifurcated Exemption 7(E) review. As reported in the last Case
15 Management Statement, now that the FBI has completed the bifurcated Exemption 7(E) review, the FBI
16 estimates that it will need approximately four months to prepare its initial summary judgment motion,
17 which would include a declaration to, among other things, establish the bases for the FBI’s
18 Exemption 7(E) assertion by describing the categories of withheld records under Exemption 7(E).

19 The parties are currently negotiating to see if they can resolve the outstanding disputes without
20 further Court intervention. To that end, the FBI has agreed to provide certain agreed-upon information to
21 Plaintiff on or around September 27, 2024. In order to provide Plaintiff time to review that forthcoming
22 information—and assess whether further Court intervention is necessary—the parties will provide the
23 Court with a further status update on October 31, 2024. At this point, the parties anticipate that the October
24 31, 2024 status update will include either (1) a report that the parties have resolved their disputes regarding
25 the FBI’s Exemption 7(E) withholdings or (2) propose a briefing schedule for bifurcated summary
26 judgment proceedings on the FBI’s Exemption 7(E) withholdings only.¹

27
28 ¹ The parties have previously agreed that the FBI expressly reserves and does not waive any and
all underlying FOIA exemptions that might apply to the potentially responsive records to the extent the
STATUS REPORT AND FURTHER JOINT CASE MANAGEMENT STATEMENT

Further Case Management Statement

1. Jurisdiction & Service

Plaintiff brought this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. All parties have been served, and there are no issues concerning personal jurisdiction.

2. Facts

On June 26, 2018, Plaintiff American Civil Liberties Union Foundation (“ACLU”) submitted a FOIA request (“Request”) to the Office of Information Police (“OIP”) on behalf of the Office of the Attorney General (“OAG”), the Office of the Inspector General (“OIG”), and the Federal Bureau of Investigation (“FBI”) seeking the release of records related to the Electronic Device Analysis Unit (“EDAU”), a unit of the FBI. The FBI divided the initial Request into five distinct requests. The FBI offered “Glomar” responses to three of Plaintiff’s requests, refusing to even confirm or deny whether responsive records exist at all. Two of these decisions were upheld on administrative appeal. The third was remanded on administrative appeal, and the FBI is still processing that request. The FBI initially closed the fourth request by stating that it was overbroad, a decision that was also overturned and remanded on administrative appeal. The FBI is still processing that request. Plaintiff does not challenge the response to the fifth request. These four subparts of the FOIA request to the FBI remain at issue in this lawsuit.

On December 22, 2020, the ACLU filed this lawsuit. ECF No. 1.

Defendants Department of Justice (“DOJ”) and Federal Bureau of Investigation (“FBI”) filed their Answer on January 28, 2021. ECF No. 17.

On January 22, 2021, OIG, a component of DOJ and a recipient of one of the FOIA requests at issue in the above-captioned lawsuit, responded to Plaintiff’s FOIA request to OIG, reporting that OIG did not locate any records responsive to Plaintiff’s FOIA request to OIG.

On February 19, 2021, OIP—the component of DOJ designated to process FOIA requests on behalf of OAG, which received one of the FOIA requests at issue in this lawsuit—responded to Plaintiff’s

parties engage in bifurcated summary judgment proceedings on the Exemption 7(E) withholdings only.

STATUS REPORT AND FURTHER JOINT CASE MANAGEMENT STATEMENT

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1 FOIA request, informing Plaintiff that no records responsive to Plaintiff's FOIA request to OAG were
2 located.

3 On May 20, 2021, in order to allow the FBI to complete its searches regarding the four subparts
4 of the Request to FBI that remain at issue and to allow the parties to meet and confer regarding a path
5 forward in the above-captioned litigation, the parties jointly requested that the Court continue their initial
6 case management conference. ECF No. 21. On May 21, 2021, the Court ordered the case management
7 conference to be continued until July 9, 2021, and extended the deadline to submit the initial case
8 management conference statement to June 18, 2021. ECF No. 22.

9 On June 16, 2021, the parties filed a stipulation agreeing to dismiss Defendant DOJ insofar as it
10 stands in for its components, OIG and OIP (on behalf of OAG). ECF No. 23.

11 On June 18, 2021, the parties filed a Joint Case Management statement. ECF No. 25. On June 24,
12 the Court vacated the Case Management Conference set for July 9, 2021 and ordered a Joint Case
13 Management Statement to be filed by November 5, 2021. ECF No. 26.

14 FBI released records on or around September 9, 2021 and September 30, 2021.

15 On November 2, 2021, the parties filed a joint cases management statement updating the Court on
16 these developments. On February 24, 2022, the parties submitted a Joint Case Management Statement.
17 ECF No. 32. On September 16, 2022, the parties advised the Court via Joint Case Management Statement
18 that ACLU had agreed to narrow the categories of records requested and that FBI would perform a
19 bifurcated review, focusing first on the application of Exemption 7(E), as set forth above. ECF No. 35.

20 The parties now submit this joint case management statement pursuant to Local Rule 16-2(e).

21 3. Legal Issues

22 At this juncture, this lawsuit raises several legal issues under FOIA:

- 23 • Whether Defendant FBI has conducted an adequate search for records responsive to
- 24 the Request, *see* 5 U.S.C. § 552(a)(3);
- 25 • Whether Defendant FBI improperly failed to grant Plaintiff's request for a limitation
- 26 of fees, *see id.* § 552(a)(4)(A)(iii); and

- Whether Defendant FBI has lawfully invoked FOIA exemptions to withhold or redact responsive records or to refuse to confirm or deny whether responsive records exist, *see id.* § 552(b).

4. Motions

There are no prior or pending motions. The parties anticipate that this matter will be resolved on summary judgment.

5. Amendment of Pleadings

No party anticipates amending its pleadings.

6. Evidence Preservation

The parties acknowledge their duty to preserve relevant materials in accordance with rules and case law applicable to FOIA actions.

7. Disclosures

The parties agree and stipulate pursuant to Federal Rule of Civil Procedure 26(a)(1)(A) that initial disclosures are not necessary, as this is a FOIA action for which there is no need to exchange such disclosures.

8. Discovery

To date, no discovery has been taken by any party. Plaintiff does not currently anticipate propounding discovery, but Plaintiff notes that discovery may be appropriate in certain circumstances and reserve the right to seek discovery. *See, e.g., Carney v. DOJ*, 19 F.3d 807, 812–13 (2d Cir. 1994) (discovery appropriate where a party has provided “some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate”).

9. Class Actions

This is not a class action.

10. Related Cases

Counsel for the parties are unaware of any related cases before another judge of this Court.

11. Relief

Plaintiff seeks the relief set forth in their Prayer for Relief. *See* Compl. at 12, ECF No. 1.

1 12. Settlement and ADR

2 This case has been assigned to the Alternative Dispute Resolution (“ADR”) Multi-Option
3 Program. ECF No. 8. The parties have conferred about ADR processes in conformance with ADR L.R. 3-
4 5. The parties respectfully submit that this case is not well-suited to ADR resolution, and that ADR is not
5 likely to increase the likelihood of resolving this matter. The parties therefore request that the Court
6 exempt this case from ADR.

7 13. Consent to Magistrate Judge For All Purposes.

8 Plaintiff declined assignment of this case to a magistrate judge for all purposes.

9 14. Other References

10 The parties agree that this case is not suitable for reference to binding arbitration or a special
11 master, or reference to the Judicial Panel on Multidistrict Litigation.

12 15. Narrowing of Issues

13 The parties have negotiated in good faith to narrow the issues in dispute, including by narrowing
14 the scope of the Request and by agreeing to bifurcate these proceedings. *See supra* Joint Status Report.

15 16. Expedited Trial Procedure

16 The parties anticipate that this case, as a FOIA matter, can be resolved on summary judgment. The
17 expedited trial procedure is therefore inapplicable.

18 17. Scheduling

19 As described *supra*, the parties have agreed that the FBI will share certain information with
20 Plaintiff in an attempt to obviate the need for summary judgment proceedings regarding the
21 Exemption 7(E) withholdings. The parties will provide the Court with a further status update on October
22 31, 2024. The parties anticipate that the October 31, 2024 status update will include either (1) a report
23 that the parties have resolved their disputes regarding the FBI’s Exemption 7(E) withholdings or
24 (2) propose a briefing schedule for bifurcated summary judgment proceedings on the FBI’s Exemption
25 7(E) withholdings only.

26 18. Trial

27 The parties anticipate that this entire case will be resolved on summary judgment if the parties do
28 not reach a negotiated resolution.

19. Disclosure of Non-party Interested Entities or Persons

As a governmental entity or agency, Defendant is exempt from the disclosure requirement of Civil Local Rule 3-15.

As set forth in Plaintiff's Civil Local Rule 3-15 statement filed on December 22, 2020, ECF No. 2, counsel for Plaintiff certify that other than the named parties, there is no such interest to report.

20. Professional Conduct

The attorneys of record for the parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

21. Other

None.

The parties submit this joint case management statement pursuant to Local Rule 16-2(e).

Respectfully submitted,

Dated: 31st May 2024

/s/ Jennifer Stisa Granick

Jennifer Stisa Granick
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
425 California Street, Seventh Floor
San Francisco, CA 94104
Telephone: 415-343-0758
jgranick@aclu.org

Jacob Snow
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: 415-621-2493
Fax: 415-255-1478
jsnow@aclunc.org

Attorneys for Plaintiff

Dated: 31st May 2024

ISMAIL J. RAMSEY
United States Attorney

/s/ Jevechius D. Bernardoni
Jevechius D. Bernardoni
Assistant United States Attorney

1 **In compliance with Civil Local Rule 5-1(i)(3), the filer of this document attests under penalty of perjury*
2 *that all other signatories have concurred in the filing of this document.*